

turer's express written warranty valid in the United States unless the seller provides an express written warranty that satisfies specified conditions. CC §1797.81(a)(1), (b). A retail seller who violates these provisions is liable to a buyer who returns the product for a refund, or credit on credit purchases, if the product has not been misused according to the printed instructions provided by the seller. CC §1797.85. Violation of these provisions also constitutes unfair competition under Bus & P C §17200, grounds for rescission under CC §1639, and an unfair method of competition or deceptive practice under the Consumers Legal Remedies Act (see §§5.26–5.30). CC §1797.86.

F. [§5.116] Home Roof Warranties

Contracts and warranties for roofing materials used on residential structures, and contracts and warranties for the installation, repair, or replacement of any portion of the roof of a residential structure are regulated by CC §§1797.90–1797.96. The warranty obligations of any contract governed by CC §§1797.90–1797.96 that was entered into on or after January 1, 1994, are directly enforceable by all subsequent purchasers and transferees of the residential structure unless the contract contains a clear and conspicuous provision limiting transfer of the warranty. CC §1797.92. Any provision limiting transferability of the warranty must meet the requirements set forth in CC §1797.94.

G. [§5.117] Home Improvement Warranties

Even though not a “sale of goods,” contracts involving labor and materials to make home improvements give rise to an implied warranty of merchantability. See *Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 582, 12 CR 257, 262.

XI. SOLICITATION AND ADVERTISING

A. Home Solicitation Contracts (Three-Day Rescission) (CC §§1689.5–1689.15)

1. [§5.118] Statutory Coverage

Civil Code §§1689.5–1689.15 apply to contracts for goods or services made at other than “appropriate trade premises” in an amount of \$25 or more, including interest and service charges. CC §1689.5(a). They do not apply to

- Contracts that buyers have the right to rescind under the Federal Consumer Credit Protection Act. CC §1689.5(a).
- Contracts for repair services with a licensed contractor if the contract price is less than \$100, the negotiation between the parties was initiated by the prospective buyer, and the contract contains a written and dated statement to that effect signed by the prospective buyer. CC §1689.5(a).
- Contracts involving vehicles or mobilehomes, or lawyers, doctors, or real estate, insurance, or securities sales people. CC §1689.5(c)–(d).
- Financial services offered by specified financial institutions when they are not connected with the sale of goods or services that are covered by the provisions. CC §1689.5(d).
- Certain contracts for emergency repairs or services initiated by the buyer or his or her insurance representative (CC §1689.13) or for repair after a disaster (CC §1689.14).

Home solicitation contracts for home improvement goods or services that provide for a lien on real property are also subject to the Unruh Act (CC §§1801–1812.20; see §§5.3–5.8). CC §1689.8.

The test for applicability of the statute is not whether the contract is made at the buyer's home but whether it is made somewhere other than the seller's place of business. Thus, it applies to a contract made at a vacant house owned by the buyer but not used as a residence. *Louis Luskin & Sons, Inc. v Samovitz* (1985) 166 CA3d 533, 212 CR 612. It also applies to telephone solicitations from the seller's place of business to the buyer's home, because contracts solicited by telephone are considered made where the offer was accepted. *People v Toomey* (1984) 157 CA3d 1, 13, 203 CR 642. See also *Williams v Kapilow & Son, Inc.* (1980) 105 CA3d 156, 165 CR 176; *Weatherall Aluminum Prods. Co. v Scott* (1977) 71 CA3d 245, 139 CR 329. Moreover, a "labor estimate" that does not comply with the requirement under CC §1689.7 for a notification of the right to cancel is a home improvement contract in violation of the home solicitation contracts law (CC §§1689.5–1689.15), and the buyer's handwritten waiver of the right to cancel was invalid when the only reason for the waiver was the buyer's desire to start work immediately. *Handyman Connection of Sacramento v Sands* (2004) 123 CA4th 867, 883–886, 20 CR3d 727.

Waiver or confession of judgment by the buyer of the statutory provisions is void and unenforceable. CC §1689.12.

The federal three-day cooling-off period for home solicitation contracts (16 CFR §429.1) is similar to state law, but does not exempt attorneys, doctors, mobilehomes, or vehicles. The federal rule does exempt transac-

tions in which the buyer has initiated the contract and specifically requests the seller to visit his or her home for the purpose of repairing or performing maintenance on the buyer's personal property. 16 CFR §429.1, Note 1(a)(5) (1984). However, the FTC rule is not intended to annul state laws that provide the consumer greater protection. 16 CFR §429.1, Note 2(a) and (b).

2. [§5.119] Statutory Requirements

The statutory requirements include the following:

- The buyer's agreement or offer must be in writing, dated, signed, and in the language of the transaction. CC §1689.7(a).
- The contract must contain a prescribed notice concerning the right of cancellation (see CC §1689(a) for requirements) and a notice of cancellation form. CC §1689.7(c).
- The buyer must receive a copy of the contract, plus an oral advisement of cancellation rights, which must also notify the buyer that the cancellation must be in writing. CC §1689.7(f).

3. [§5.120] Remedies

The buyer may cancel within three business days after signing the contract (CC §1689.6), or until the seller has complied with the contract requirements of CC §1689.7 (CC §1689.7(g)). If the purchase is of a personal emergency response unit (as defined in CC §1689.6(f)), the buyer has seven days to cancel, unless the unit is installed with, and is a part of, a home security alarm system subject to the Alarm Company Act (Bus & P C §§7590–7599.70). CC §1689.6(b). The buyer may cancel the contract up until the time he or she receives a signed and dated contract that meets all the specifications of CC §§1689.5–1689.15. CC §1689.15.

Upon cancellation the buyer must tender the goods to the seller at the buyer's own address. CC §1689.11(a). If the seller does not pick up the goods within 20 days, the buyer may retain them without obligation. CC §1689.11(a). The seller is not entitled to compensation for services rendered before cancellation. CC §1689.11(c). The seller may not recover on quantum meruit except in very unusual circumstances. *Louis Luskin & Sons, Inc. v Samovitz* (1985) 166 CA3d 533, 212 CR 612; *Weatherall Aluminum Prods. Co. v Scott* (1977) 71 CA3d 245, 139 CR 329. But see *Beley v Municipal Court* (1979) 100 CA3d 5, 160 CR 508 (court allowed seller to recover in quantum meruit when seller had substantially completed job worth over \$11,000).

Within 10 days after cancellation, the seller must return any payments made and any note or evidence of indebtedness. CC §1689.10(a). Until the seller has complied with CC §§1689.7–1689.11, the buyer may retain possession of goods delivered to him or her by the seller and has a lien on them for any recovery to which the buyer is entitled. CC §1689.10(c).

For additional civil penalties that may apply in these cases, see Bus & P C §17500.3.

B. Unsolicited Goods and Services (CC §§1584.5–1584.6)

1. [§5.121] General Provisions

These sections prohibit the sending of voluntary and unsolicited goods and services by any means. CC §§1584.5–1584.6.

Goods must not be provided unless they have been ordered, except goods that are provided pursuant to an agreed plan under which the consumer has the burden to inform the seller not to ship. CC §1584.5(a).

2. [§5.122] Relief Available

All goods or services received that have not been ordered become an unconditional gift to the recipient. If the sender continues to send bills or requests for payment, the recipient may sue for an injunction. CC §§1584.5–1584.6.

C. [§5.123] Telephone Mail Order or Catalog Business (Bus & P C §17538)

Sellers conducting a telephone mail order or catalog business, including through the Internet, television, or other telecommunications device, may not accept money through the mail from a consumer ordering goods or services unless they deliver the goods within 30 days, make a refund, or make arrangements for acceptable substitute goods. Bus & P C §17538(a), (e). If the payment was made by means of a third party creditor, the vendor must issue a credit within seven business days. Bus & P C §17538(e).

D. [§5.124] Electronic Commerce Act of 1984 (CC §§1789–1789.8)

Civil Code §§1789–1789.8 regulate electronic commercial services, defined in CC §1789.2 as an electronic shopping system to conduct the purchase of goods and services via a telecommunications network. The definition excludes conventional voice-only telephone service, one-way television or radio broadcasting, an electronic fund transfer system, the use

of credit cards through an electronic commercial service, and a service provided through an electronic terminal located at a place of business where the sale of those goods or services otherwise occurs. “Goods and services” covered by the Act are defined as tangible items or physical services provided to the consumer, or tickets or vouchers for such items or services, but not including computerized data delivered to the consumer by a computer terminal or in printed form.

The Act requires providers of electronic commercial services to provide to consumers who contract for the service the following information: (1) the service’s name, address, and telephone number; (2) any charges imposed for use of the service; and (3) the procedure a consumer may follow to resolve a complaint or receive further information regarding the service. The Act applies to transactions entered into on or after July 1, 1985, and does not apply when preempted by federal law.

E. Seminar Sales Solicitation Contracts (CC §§1689.20–1694.24)

1. [§5.125] General Provisions

Civil Code §§1689.20–1689.24 regulate contracts for sale, lease, or rental of goods or services costing \$25 or more which are made using selling techniques in a seminar setting, *i.e.*, a setting other than the buyer’s residence. Seminar sales solicitation contracts do not include any contract covered by the Federal Consumer Credit Protection Act. CC §1689.24(a)–(b).

A seminar sales solicitation contract must be written in the same language used in the oral sales presentation (CC §1689.21(a)), and must contain specified conspicuous language concerning the right to cancel and the means for cancellation (CC §§1689.20–1689.21). The seller must provide the buyer with a copy of the contract containing the notice of cancellation, in addition to giving the buyer oral notice of the right to cancel at the time the contract is executed. CC §1689.21(d).

2. [§5.126] Remedies

The buyer may cancel within three business days after signing the contract (CC §1689.20(a)), or at any time before the seller has complied with the statutory requirements (CC §1689.21(e)). Within 10 days after cancellation, the seller must make a refund to the buyer (CC §1689.22) and within 20 days after cancellation, the buyer must return the goods to the seller (CC §1689.23).

F. [§5.127] Unsolicited Advertising by Fax or E-Mail Transmission

No person or entity may initiate or advertise in an unsolicited e-mail that

originates from or goes to an e-mail address in California. Bus & P C §17529.2(a), (b). Nor may a person or entity collect e-mail addresses or obtain them by automated means for the purposes specified above. See Bus & P C §17529.4(a), (b).

A recipient of e-mail transmitted in violation of Bus & P C §17529.2, as well as a mail service provider or the Attorney General, may recover actual damages and/or liquidated damages of between \$1000 for each unsolicited commercial e-mail advertisement, up to \$1,000,000 per incident. Bus & P C §17529.8(a)(1). A plaintiff may also recover attorneys' fees and costs. Bus & P C §17529.8(a)(2). But if a defendant establishes that it has implemented procedures designed to prevent this kind of unsolicited e-mail, the liquidated damages are reduced to between \$100 and \$100,000. Bus & P C §17529.8(b).

Before its amendment in 2002, Bus & P C §17538.4 also prohibited unsolicited fax advertisements. According to the legislative summary of AB 2944, prepared on August 31, 2002, the Legislature deleted these provisions so that the federal law prohibiting unsolicited fax advertisements (42 USC §227(b)(1)(C)) would prevail. That law, known as the federal Telephone Consumer Protection Act (TCPA), provides a private right of action for injunctive relief and damages in state court, if otherwise permitted by the state's laws or court rules. 42 USC §227(b)(3) (plaintiff may recover actual damages or \$500 in damages for each violation, whichever is greater, and this amount may be trebled if the court finds that defendant willfully or knowingly violated statute); see *Murphey v Lanier* (9th Cir 2000) 204 F3d 911, 912–915 (action must be filed in state, not federal, court, which can provide a more cost-efficient remedy for these small claims). Any federal law that is enacted, which prohibits or otherwise regulates the transmission of unsolicited advertising by e-mail, will likewise supersede the provisions of Bus & P C §17538.4 with respect to e-mailed documents. Bus & P C §17538.4(i). A California court has confirmed that a plaintiff does indeed have a private right of action under the TCPA, which prohibits sending unsolicited faxes. *Kaufman v ACS Sys., Inc.* (2003) 110 CA4th 886, 899–905, 2 CR3d 296.

G. [§5.128] Unsolicited Telephone Solicitations

Calls by a telephone solicitor to a telephone number registered on the “do not call” list are prohibited. Bus & P C §17592(a). It is also unlawful to interfere with a subscriber's right to be placed on the list or to charge for such a placement. Bus & P C §17591. The prohibition against calling does not apply if the subscriber has agreed to or requested the calls or in certain other situations, such as when the seller and the subscriber have an established business relationship. Bus & P C §17592(b).

Someone who has received a prohibited telephone solicitation under Bus & P C §17592(a) may bring an action for an injunction or an order to prevent further violations. Bus & P C §17593(b). Once an injunction or order has been issued, if the person receives further solicitations in violation of the injunction or order within 30 days, the person may file a subsequent small claims court action for enforcement and for civil penalties up to \$1000. Bus & P C §17593(b).

An affirmative defense to such an action is that the violation was accidental and in contravention of the defendant's own policies. Bus & P C §17593(d).

In addition to the California prohibition against unwanted telemarketing, federal law, known as the Do-Not-Call Implementation Act (15 USC §§6101–6108), also prohibits these solicitations.

XII. HOME BUILDING AND IMPROVING

A. Contractor's License Law (Bus & P C §§7000–7173)

1. [§5.129] Statutory Coverage

The purpose of the Contractor's License Law is to protect the public from dishonest, incompetent, and irresponsible contractors. *Lewis & Queen v N. M. Ball Sons* (1957) 48 C2d 141, 149, 308 P2d 713, 718. "Contractor" is very broadly defined to include anyone who does any work on a building project of any kind (Bus & P C §§7026–7027; 59 Ops Cal Atty Gen 424 (1976)), unless statutorily exempted (Bus & P C §§7040–7040.5). Among others, the term does not include licensed architects or registered engineers (Bus & P C §7051), those who furnish unfabricated materials or supplies (Bus & P C §7052), certain owner-builders as long as the structure they build is not intended or offered for sale (Bus & P C §7044), or an employee whose sole compensation is wages (Bus & P C §7053). The contractor's license law does not apply to jobs with a contract price less than \$500 unless the person advertises as a contractor. Bus & P C §7048(a).

2. [§5.130] Statutory Requirements

Under Bus & P C §7164, every contract and any changes in a contract between an owner and contractor for the construction of a single-family dwelling to be retained by the owner for a minimum of one year must be in writing, signed by both parties, and must contain the following:

- Identifying data, including the contractor's license number.
- Approximate beginning and completion dates.